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No. 96-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHNSON & HIGGINS,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this brief in reply to the Brief for the Equal Employment Opportunity Commission in Opposition ("Resp. Br.").

I.

The Panel's Decision is Contrary to this Court's Decisions Construing the Term "Employee" In Federal Legislation.

The EEOC acknowledges this Court's repeated holdings that when a federal statute does not helpfully define the term "employee," it is to be understood as referring to "'the conventional master-servant relationship as understood by common-law agency doctrine.'" *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-40 (1989)). Indeed, as the EEOC notes, the Court reaffirmed that principle earlier this year in *Walters* v. *Metropolitan Educ. Enter. Inc.*, 117 S.Ct. 660, 666 (1997). The EEOC also acknowledges that a determination as to whether an

individual is an employee under common law principles must be based on "an examination of the 'totality of the circumstances.'" (Resp. Br. 11.) The EEOC does not argue that the rigid three-factor test applied by the majority below is equivalent to the common law test mandated by this Court's decisions, and plainly it is not. Rather, the EEOC suggests that the majority actually did examine the totality of the circumstances. (*Id.*) That is simply wrong.

The majority could not have been clearer that its decision was based solely on the three factors it isolated and described as a "more manageable" alternative to the "somewhat nebulous 'common law agency' test." (18a). The majority's opinion states that explicitly, holding "[b]ecause all three of these prongs are satisfied in this case, we conclude that, as a matter of law, J&H's directors are also 'employees' for purposes of the ADEA." (19a.) The EEOC's contention that the majority's analysis went beyond those three factors is based on two statements by the majority that were made in connection with its discussion of the third factor (whether the individual in question "reports" to someone higher in a hierarchy). (*See* 20a.) Those two comments do not approach the full examination of the economic realities of the Directors' ownership and management of J&H that the EEOC acknowledges is required.

Further, the matters to which the majority refers do not support its conclusion that the Directors were employees under the ADEA. Directors' compensation was not set by the "senior members of the Board," as the majority suggests (20a). Rather, Salary Pool percentages were proposed by a committee comprised of between one-third and one-half of the Board members and approved by the entire Board. (*See* J&H's Petition for a Writ Certiorari ("Pet.") 6-7.) J&H's statement that an individual, after election to the Board, would

"continue in J&H's active service as an officer and employee of J&H or one of its subsidiaries" (quoted at 20a) meant nothing more than that Directors were required by J&H's Charter to remain actively engaged in the service of the firm. (*See* Pet. 5-6.) That did not make the Directors employees for ADEA purposes. As the dissenting judge below correctly stated,

> it is true that J&H's directors [did] some things that employees do. But what is relevant here is that they alone [held] all the legal and financial power to direct the corporation's acts. (34a.)

The EEOC misstates J&H's position as being that "any individual who owns *or* manages a corporation cannot also be an employee of the corporation." (Resp. Br. 12; emphasis added.) What J&H actually contends is that individuals such as the J&H Directors who collectively own *and* manage an enterprise are not employees under common law principles, and thus as to their retirement arrangements *inter se* are not employees within the meaning of the ADEA. As J&H noted in its petition, Justice Powell articulated that principle clearly in his concurring opinion in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), an opinion which the EEOC's brief does not address. Justice Powell stated that the relationship between partners (law partners in the *Hishon* case) differs from that between employer and employee because, *inter alia*, "[t]he essence of the law partnership is common conduct of a shared enterprise." *Id.* 79-80. Indeed, as J&H also noted in its petition, the EEOC itself has recognized the same principle, holding (in another opinion not addressed in the EEOC's brief) that partners are "not employed by the partnership [because] they are the co-owners who control and manage the business." EEOC Decision No. 85-4, Emp. Prac. Guide (CCH) ¶ 6846, at 7040 (March 18, 1985). So too, here, J&H's Directors

were "co-owners who control[led] and manage[d] the business" of J&H.[1]

The EEOC's assertion that J&H's position "cannot be reconciled" (Resp. Br. 12) with the Court's decisions in *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) and *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318 (1992) is wrong. J&H's position here is that the economic realities test, which the EEOC concedes applies, cannot be restricted to the three narrow "prongs" used by the majority below, and that under the correct totality-of-the-circumstances test, J&H's Directors, who were limited in number by J&H's Charter to a maximum of 44 and who owned and managed a worldwide business employing over 8,000 individuals, were employers, not employees, for the purpose of assessing under the ADEA their self-imposed retirement arrangements. Nothing in *Goldberg* or *Darden* is contrary to that position. In *Goldberg*, the Court held that the 200 homeworker members of a Maine knitting cooperative were employees for purposes of the Fair Labor Standards Act, stating that "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship," and noting as an example that "if members of a trade union bought stock in their corporate employer, they

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[1]The EEOC erroneously asserts that in the case of a large corporation in which many employees own stock, including officers and managers, J&H's position would require that "an employee would lose the protection of federal law merely by buying some stock (and presumably regain it by selling)." (Resp. Br. 13, n. 10.) The individuals the EEOC envisions would plainly not, in economic reality, control the corporation as the Directors controlled J&H. An employee styled a "manager" for organizational purposes does not become an owner-manager in the sense that the J&H Directors were simply by purchasing stock.

would not cease to be employees." *Id.* 32. Although the homeworkers in *Goldberg* may in some nominal sense have had a proprietary interest in the cooperative, the opinion makes clear that they had no meaningful control over the enterprise. *Id.* 33 (noting, *inter alia,* that the homeworkers were "regimented under one organization, manufacturing what the organization desire[d] and receiving the compensation the organization dictate[d]"). Whatever proprietary interest the *Goldberg* homeworkers had in the cooperative, it plainly was incidental to their status as employees. By contrast, the J&H Directors' "employment" by J&H was (as the dissenting judge below recognized) "'but an aspect of the fundamentally entrepreneurial relationship that the Directors [had] among themselves and to the firm as a whole.'" (32a.)

The EEOC suggests that J&H's position is contrary to *Darden* because, the EEOC asserts, the *Darden* opinion "discuss[es] factors relevant to whether [an] individual is [an] employee, but [does not include in its discussion] whether [the] individual is [a] stockholder or manager." (Resp. Br. 12.) The factors to which the EEOC refers, however, are factors relevant in applying the common-law agency test where the question is whether an individual is an employee or an independent contractor. The *Darden* Court was not attempting to set forth specific factors that would be relevant in applying that test to determine whether a person is an employee or an employer.

In sum, under the economic realities test mandated by this Court's decisions, "[b]ecause they own[ed] and controll[ed] the company, J&H's directors should be considered employ*ers* not employ*ees* — for the same reason that a general partner is considered 'a business owner[] and manager[],' not an employee." (33a.) The court of appeals' rigid and constricted three-factor test leads to the nonsensical

result that the J&H Directors have been treated as "victims" of a retirement arrangement of which they themselves were the "architects" and which applied only to them. (27a.)

II.

The Panel's Decision Conflicts With Decisions of Other Courts of Appeals.

The EEOC's assertion that the panel's decision below does not conflict with *EEOC* v. *Dowd & Dowd,* 736 F.2d. 1177 (7th Cir. 1984), *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) and *Devine* v. *Stone, Leyton & Gershman,* 100 F.3d 78 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1694 (1997) is insupportable. Contrary to the EEOC's contention (Resp. Br. 13-14), those decisions were not limited to professional corporations such as law and accounting firms. Rather, all three opinions held, in conflict with the majority's decision below, that individuals who are in reality the owner-managers of an enterprise — whatever its organizational form — are not employees for purposes of the federal employment discrimination laws.

In *Dowd & Dowd,* the court applied to a professional corporation its prior holding in *Burke* v. *Friedman*, 556 F.2d 867, 869 (7th Cir. 1977), that "partners can[not] be regarded as employees rather than employers *who own and manage the operation of the business.*" 736 F.2d at 1178 (emphasis added). Similarly, in *Fountain,* the court held that the relevant inquiry is the "extent to which [the individual's] role dealt with traditional concepts of management, control and ownership," and, further, that such an inquiry must "focus not on any label, but on the actual role played [by the individual] in the operations of the involved entity." 925 F.2d at 1400-01. Finally, the *Devine* court expressly disagreed with the decision below here, and held that, "[i]n deciding whether the

shareholder-directors are employees or employers, we look to the extent to which they manage and own [the business]." 100 F.3d at 81. All three opinions make clear that it is control of the enterprise — not its form — that determines whether a person is an employee or not for purposes of the employment discrimination laws.

III.

The Director's Retirement Policy was Based on Reasonable Factors Other Than Age.

The EEOC's argument that the ADEA's RFOA provision applies only in the context of age-neutral decisions cannot be squared with the text of the statute. The RFOA provision states that a decision taken "because of age" is nevertheless not unlawful if it is "based on reasonable factors other than age." As J&H noted in its petition, if a decision were age-neutral, it would not have been taken "because of age" and there would be no occasion for an RFOA defense. The EEOC's interpretation effectively reads the RFOA out of the ADEA.

The EEOC is mistaken in asserting that J&H's reading of the RFOA language "would permit an employer... to fire or refuse to hire older workers merely because the employer believed that older people should devote themselves to good deeds or because it wanted to make room for younger workers" (Resp. Br. 17). The RFOA provision renders lawful actions taken "because of age" if the full facts show that the action was really "based on reasonable factors other than age." Decisions of the sort the EEOC imagines plainly would involve arbitrary (and therefore unreasonable) judgments about older workers — namely, that older people should devote themselves to pursuits other than employment or that they are, for whatever reasons, less desirable than younger employees. The policies underlying

J&H's plan — achieving orderly succession of management and rationalizing post-retirement compensation — make no such invidious assumptions as to age.

The EEOC's argument that the ADEA's BFOQ provision would be meaningless if the RFOA defense were not restricted to age-neutral decisions is also misguided. In *Western Air Lines* v. *Criswell*, 472 U.S. 400 (1985), on which the EEOC relies, the Court held that where an employer uses age as a proxy for safety-related job qualifications (in *Criswell*, low risk of sudden incapacity during flight), "age qualifications [must] be something more than 'convenient' or 'reasonable;' they must be 'reasonably necessary . . . to the particular business.'" *Id.* at 414 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 ((5th Cir. 1976)). The Court held that an employer can demonstrate that its age qualifications are reasonably necessary by establishing either (1) that there is "'a factual basis for believing that all or substantially all [persons over the age qualifications] would be unable to perform safely'" or (2) "that it is 'impossible or highly impractical' to deal with older employees on an individualized basis." *Id.* (quoting *Tamiami).* Holding the RFOA applicable to decisions that are expressed in terms of age but make no arbitrary assumptions about the capacities of older individuals would not, as the EEOC argues, permit employers to circumvent the *Criswell* standards.

Finally, the EEOC errs in arguing that this Court's decision in *City of Los Angeles, Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), a Title VII case, is applicable to the RFOA. *Manhart* involved Section 703(h) of Title VII, which to the extent relevant here does no more than make clear that Title VII's prohibition of sex discrimination was not intended to affect certain provisions of the Equal Pay Act, 29 U.S.C. § 206(d). Section 703(h) is not analogous to the RFOA provision.

In pertinent part, Section 703(h) reads

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29. 42 U.S.C. § 2000 e-2(h).

The Equal Pay Act provisions to which Section 703(h) refers provide in relevant part that the Act's prohibition of "paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex" does not apply "where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex." In contrast to the RFOA, which renders actions taken "because of age" lawful if they are "based on reasonable factors other than age," Section 703(h) does not render actions taken "because of sex" lawful under any circumstances. Rather, Section 703(h) simply makes clear that payment practices that differentiate on factors other than sex, but that might result in paying a member of one sex less than a member of the opposite sex for equal work, are not unlawful. *Manhart*'s interpretation of Section 703(h) thus has no application in interpreting the ADEA's RFOA provision.

IV.

The Issues Raised by the Petition Should be Authoritatively Resolved by This Court.

The EEOC suggests in a footnote at the end of its brief (Resp. Br. 20, n.13) that the issues raised by J&H's petition have little practical importance. That suggestion is wrong. As

J&H noted in its petition (at 22-23), the accelerating growth of limited liability companies makes it likely, if not inevitable, that the proper treatment of the owner-managers of corporations under the federal employment discrimination laws will remain an ongoing subject of litigation, in all likelihood with greater frequency, until resolved by the Court.

CONCLUSION

The panel's decision is contrary to this Court's decisions and to plain statutory language and is in conflict with decisions of other courts of appeals. The Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

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